87-681

NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1987

GARY RAWSON,
Petitioner,

v.

SEARS, ROEBUCK AND COMPANY,
Respondent.

APPENDIX
PART II

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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Appendix

530 F.Supp.776

UNITED STATES DISTRICT COURT
D. COLORADO

Civ. A. No. 81-K-1454

GARY RAWSON,

Plaintiff,

v.

SEARS ROEBUCK & COMPANY,

Defendant.

January 27, 1982

MEMORANDUM AND OPINION

KANE, District Judge.

Plaintiff's complaint, which was originally filed in the Puelbo County District Court, alleges that the plaintiff was wrongfully fired from his employment with the defendant and, alternatively, that the defendant wrongfully refused to allow him to resign. He states 11 claims for relief and seeks compensatory and punitive damages. After the plaintiff filed this action, the defendant removed it to this court, which has subject matter jurisdiction under 28 U.S.C. Section 1332 (a).

Defendant moved to dismiss all of the plaintiff's claims, pursuant to F.R.Civ.P. 12(b)(6), arguing that none of them state a claim upon which relief may be granted. Briefs have been submitted

and the motion is now ripe for determination. I now grant the motion in part and deny it in part.

I. PRIVATE RIGHT OF ACTION

Plaintiff's first claim alleges that the defendant violated C.R.S. Section 8-2-116 by firing the plaintiff solely because of his age.[1] In its motion to dismiss, defendant argues that this fails to state a claim upon which relief may be

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1. C.R.S. Section 8-2-116 provides:
No . . . corporation conducting within this state any business requiring the employment of labor shall discharge any individual between the ages of eighteen and sixty years, solely and only upon the ground of age, if such individual is well versed in the line of business carried on by such . . . corporation and is qualified physically, mentally, and by training and experience to satisfactorily perform and does satisfactorily perform the labor assigned to him, or for which he applies.

granted because the statute does not grant the right to bring a private civil action. In support of this argument, defendant cites C.R.S. Section 8-2-117, which states that anyone who violates C.R.S. Secton 8-2-116 shall be subject to a fine of between $100 and $250. Defendant argues that this penalty provision means that the Colorado Legislature "has not seen fit to legislate any private civil right of action for violation of" C.R.S. Section 8-2-116. Defendant then cites, without any elaboration, a string of six cases.

Whether a particular statute grants a private right of action is a question of statutory construction. Touche Ross & Co. v. Redington, 442 U.S. 560, 568, 99 S. Ct. 2479, 2485, 61 L.Ed. 2d 82 (1979).

In Cort V. Ash, 422 U.S. 66, 78, 95 S.Ct. 2080, 2088, 45 L.Ed. 2d 26 (1975), the Supreme Court stated a four-part test for determining whether a federal statute has an implied private right of action:

> 1) [I]s the plaintiff 'one of the class for whose especial benefit the statute was enacted'--that is, does the statute create a federal right in favor of the plaintiff?
>
> 2) [I]s there any indication of legislative intent, explicit or implicit, either to create such a remedy or deny one?
>
> 3) [I]s it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?
>
> 4) [I]s the cause of action one traditionally relegated to state law in any area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law?

(citations omitted, emphasis in original).

Because the present case involves a Colorado statute, the U.S. Supreme Court's analysis is not controlling;[2] however, in the absence of any contrary word from the Colorado Supreme Court,[3] the Cort test provides useful guidance.

[1] I conclude that the first three elements of the Cort test are satisfied here. First, C.R.S. Section 8-2-116

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2. Obviously the fourth element of the Cort test does not apply at all in the present case.

3. The three Colorado Supreme Court cases cited by the defendant are all inapposite. In Gladden v. Guyer, 162 Colo. 451, 459, 526 P.2d 953, 957 (1967), the court held that a party's violation of a public cattle-testing statute did not void a contract it entered into, but only made it voidable. The court's decision therefore implies that the other party could exercise a right stemming from the statute to void the contract if it so desired. In Colorado Centennial Railroad Co. v. Humphery, 16 Colo. 34, 36, 26 P. 165,

especially singles out employees between the ages of 18 and 60 who have been discharged solely because of their age. By stating his first cause of

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3. Continued . . .
165-66 (1891), the court considered a statute that specified the size and background of juries that would try certain cases. The court stated,

> If by statute a new power or right is conferred, and a particular form or manner of proceedings in connection therewith is provided, it is an exclusion of any other mode. Where a statue gives a new power, and at the same time provides the means of executing it, those who claim the power can execute it in no other way.

(citations omitted). I do not understand how this applies to the issue of what rights of action exist under a statute that is silent on the means of executing it. Finally, in Quintano v. Industrial Commission, 178 Colo. 131, 135-36, 495 P.2d 1137, 1139 (1972), the court held that it generally would not find an implied right of private civil action against a state agency in a new statute, because of the problems of sovereign immunity. Those considerations are obviously not present in a case between two private parties.

action, plaintiff has alleged that he is within this class. Second, other statutes indicate that the Colorado Legislature intended to create a private right of action here. C.R.S. Section 8-3-121(1) states,

> Any person who suffers injury because of an unfair labor practice has a right of action, jointly and severally, against all persons participating in said practice for damages caused to the injured person thereby.

C.R.S. Section 8-3-108(1)(1) provides that unfair labor practices include committing "any crime or misdemeanor in connection with any controversy as to employment relations." This court of course cannot determine whether the defendant has criminally violated C.R.S. Section 8-2-116. However, the Colorado legislature's broad definition of unfair

labor practices indicates an intent to create a private right of action to anyone who can prove by a preponderance of the evidence that a defendant has violated a criminal labor statute. I conclude that the Colorado legislature intended to create a private right of action under C.R.S. Section 8-2-116 and that such a right of action is consistent with the state's legislative scheme in labor relations. Plaintiff's first claim for relief therefore will not be dismissed.

II. OUTRAGEOUS CONDUCT

Plaintiff's second claim alleges that defendant "willfully, wantonly, and maliciously fired the [p]laintiff, . . . and would not allow him to resign with dignity." It then alleges that

defendant's actions constitute outrageous conduct. His third claim alleges that defendant's acts were intended to "cause extreme emotional distress to the [p]laintiff," and did in fact do so. Defendant's motion to dismiss simply states,

> Plaintiff's Second and Third Claims for Relief do not state a claim upon which relief can be granted for outrageous conduct resulting in emotional distress and is (sic) properly subject to dismissal.

In Rugg v. McCarty, 173 Colo. 170, 476 P.2d 753 (1970), the Colorado Supreme Court considered the tort of intentional or reckless infliction of emotional distress. In that case the plaintiff has alleged that she had entered into a $180 health studio contract, became disabled at the first lesson and was then unable to continue

her exercise sessions. After one of the defendants refused to allow her to rescind the contract, she continued to make payments, reducing the unpaid balance to $44.50. Although she had promised to pay that balance, her complaint alleged that the defendants repeatedly harassed her with numerous phone calls and letters demanding payment, and inquired with her employer about garnishing her wages, even though they did not have an outstanding judgment against her. Her complaint further alleged that defendants' acts

> were done **wilfully and wantonly** in disregard of her rights; and that the acts of the defendants were done **intentionally** with the **intention of causing [her] to suffer mental anguish, embarrassment, humiliation and extreme mental suffering.**

Id. at 173, 476 P. 2d at 754 (emphasis in

original).

The court found that this stated a cause of action, and reversed the trial court's granting of defendants' motion to dismiss. Id. at 177, 476 P.2d at 756. The court adopted Rest.2d Torts Section 46 (1965):

> Outrageous Conduct Causing Severe Emotional Distress:
>
> (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, . . .

The court also quoted a Restatement Comment

> liability has been found only in those cases where the defendant's conduct has been extreme and outrageous.
>
> '* * * Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all

> possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally the case is one in which a recitation of the facts to an average member of community would lead him to exclaim, "Outrageous!"'

Id. (emphasis in orginal, quoting Rest. 2d Torts Section 46, comment d, at 73).

Several subsequent Colorado Court of Appeals cases have considered intentional or reckless infliction of emotional distress. Because I must determine whether a particular fact pattern is sufficient to state a claim under this tort, I will summarize the facts of these previous cases.

Three appellate cases upheld jury findings of intentional infliction of emotional distress. In Enright v. Groves, 39 Colo. App. 39, 560 P.2d 851,

854 (1977), a scuffle resulted after the defendant police officer wrongfully demanded to see plaintiff's driver's license. The appellate court found the police officer's uncompromising conduct and his handcuffing and propelling of defendant to be substantial evidence to support the jury's verdict. In DeCicco v. Trinidad Area Health Association 40 Colo. App. 63, 573 P.2d 559, 562 (1977), the defendants refused to furnish the requested ambulance service to plaintiff's wife because her attending physician had recently resigned from the defendant's hospital. The appellate court found that the jury's verdict for the plaintiff was reasonable, because the defendants' action delayed taking a critically ill person to a hospital. In Meiter v. Cavanaugh, 40 Colo. App. 454,

580 P.2d 399, 400-01 (1978), the defendant, a lawyer, intentionally breached a house sales contract with the plaintiff, who was not sophisticated in legal matters, by refusing to vacate the house by the date required. The defendant also called the plaintiff offensive names, wrongfully threatened court action against her, and then left the house that he had sold to her in a seriously damaged condition. The appellate court noted that any one of these actions would probably not survive a directed-verdict motion, but that together they supported the jury's verdict. 580 P.2d at 401.

One appellate case sustained a trial court judgment in favor of the defendant in an intentional infliction of emotional distress case. In Paris V. Division of

State Compensation Insurance Fund, Colo. App., 517 P.2d 1353, 1355 (1973), the defendant had sent the plaintiff, a paraplegic, a letter of reprimand, which also stated that his job had been created for him because of his handicap. The appellate court affirmed the trial court's finding that this did not establish a case for intentional infliction of emotional distress.

Four appellate cases affirmed trial courts' dismissing intentional infliction of emotional distress claims before trial. In Deming v. Kellogg 41 Colo. App. 264, 583 P.2d 944, 945-56 (1979), the court affirmed the trial court's dismissal of outrageous conduct claim stemming from an automobile accident. In Hansen v. Hansen 43 Colo. App. 525, 608 P.2d 364, 365-66 (1979), the court

affirmed the trial court's granting summary judgment to a defendant sued by her son, who had alleged that plaintiff's failure to support him had caused him severe emotional harm. In First National Bank in Lamar V. Collins, Colo. App., 616 P.2d 154, 156 (1980), the plaintiff alleged that one of the defendants had made misrepresentations regarding an associated store that the plaintiff would operate. While the appellate court found that the plaintiff had stated a claim for negligent misrepresentation, it also held that he had not stated a claim for intentional or reckless infliction of emotional distress. Finally, in Vigoda V. Denver Urban Renewal Authority, Colo. App., 624 P.2d 895, 898 (1981) (cert. granted by Colorado Supreme Court), the appellate court affirmed the trial

court's conclusion that various pre-contract negotiations and actions by the defendant did not state a claim for intentional infliction of emotional distress.

The first four Colorado Court of Appeals cases indicate that the question of whether defendant has caused intentional or reckless infliction of emotional distress is often a question of fact to be determined by trial. The last four cases demonstrate, however, that there is a certain threshold level of conduct that must be established for the plaintiff to state a cause of action. Because all of these cases are based largely on their own facts, it is difficult to ascertain the standards necessary for the cause of action. I do note, however, that there are certain

similarities in the cases that have recognized a cause of action. In two, Rugg v. McCarty and Meiter v. Cavanaugh there was a pattern of conduct by the defendant that either intentionally or recklessly caused severe emotional distress to the plaintiff. In the other two, Enright v. Groves and DeCicco v. Trinidad Area Health Association, the plaintiffs' causes of action were predicated on public or quasi-public officials severely abusing their duties and responsibilities. In contrast, the cases finding no cause of action did not involve either patterns of conduct calculated to cause emotional distress or severe abuses of discretion by public officials.

[2] In many, if not most, civil

lawsuits the plaintiff believes that the defendant's conduct has been outrageous. Most lawsuits also cause the plaintiff (and often the defendant) emotional stress. Yet very few fact situations give rise to a cognizable claim for intentional infliction of emotional distress. The spate of complaints precipitated by the Rugg v. McCarty case which include claims for outrageous conduct tend to make the critical reader think that there is a lot less there than meets the eye.

> It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort.

Rest. 2d, Torts Section 46, comment d, at 73. I conclude that claims for intentional infliction of emotional distress will normally only be cognizable in cases where the defendant has engaged in a pattern of conduct that either has intended to cause or recklessly did cause severe emotional distress. While it is possible for a single, isolated activity to be a sufficient basis for a cause of action, it only will be so where a public or quasi-public official has severely abused his discretion or private individual has blatantly and severely harassed another.

[3] In the present case plaintiff alleges that he had been an employee of the defendant for 33 years and the manager of defendant's Pueblo store for the last 14 years. He then alleges that

the defendant "willfully, wantonly, and maliciously fired the [p]laintiff, . . . and would not allow him to resign with dignity, and that the defendant intended to cause the plaintiff severe emotional distress. These allegations do not state either a sufficiently outrageous pattern of conduct or a sufficiently outrageous isolated incident. Clearly there is not a sufficient recitation of facts to lead an average member of the community to exclaim, "outrageous." The second and third claims are insufficient to state a claim for extreme and outrageous conduct, and therefore are dismissed.

III. BREACH OF CONTRACT

[4, 5] Plaintiff's fourth claim for relief alleges

> That the acts of the Defendant, Sears, constitute a breach of contract.

Defendant moved to dismiss this claim, arguing that no contract, express or implied is alleged in the complaint. Plaintiff responds that C.R.S. Section 8-2-116 "created by law" a contract between the plaintiff and the defendant. This argument is without merit. While plaintiff has stated a cause of action under C.R.S. Section 8-2-116, that statute does not also create an independent breach-of-contract action unless there was in fact a contract.

F.R.Civ.P. 8(a)(2) requires only that the complaint state

> a short and plain statement of the claim showing the the pleader is entitled to relief.

The plaintiff is thus not required to state all the elements of a particular

claim, but only state ~~facts~~ sufficient to give the opposing party fair notice of the claim. See C. Wright & A. Miller, Federal Practice and Procedure Section 1218, at 134 (1969). Plaintiff's fourth claim does not give this fair notice and therefore is dismissed.

IV. PROMISSORY ESTOPPEL

Plaintiff's fifth claim alleges that he relied to his detriment on statements and representations of the defendant and that these acts of the defendant "constitute promissory estoppel, or a breach thereof." Defendant responds that plaintiff has not alleged "any basis sufficient to satisfy the promissory elements of estoppel." In Mooney v. Craddock 35 Colo. App. 20, 530 P.2d 1302, 1305 (1974), the court stated that

the doctrine of promissory estoppel

> should be applied to prevent injustice where as here, a promise was made which the promisor should reasonably have expected would induce action or forbearance of a material character and the promise in fact induced such action or forbearance.[4]

[6] Plaintiff's complaint alleges that the defendant "told, promised, and inferred (sic) to the plaintiff that he would have a job with Sears until his retirement." The complaint then alleges that plaintiff did several acts to his

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4. The court cited Rest. Contracts, Section 90, which states:

> A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promisee.

detriment in reliance on defendant's representations.[5] This is sufficient to state a claim under the promissory estoppel doctrine.

V. WRONGFUL DISCHARGE

[7] Plaintiff's sixth claim alleges that the defendant's acts "constitute the tort of wrongful discharge." In Lampe v. Presbyterian Medical Center 41 Colo. App. 465, 590 P.2d 513 (1978), the court held that:

> In the absence of special consideration or an express stipulaton as to the duration of employment, an indefinite general hiring is terminable at will by either party.

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5. These allegations are contained in complaint paragraphs that are not incorportated into the fifth claim for relief. I do not consider this to be a material defect here, where the defendant received notice of the allegations.

590 P.2d at 514. The court noted that this rule would not apply if a plaintiff claimed that he was discharged for exercising a "specifically enacted right [or] duty," such as the right to file for workmen's compensation or the duty to serve on a jury. 590 P.2d at 515. In this present case, however, plaintiff does not allege that he was fired for exercising any specific right or duty. He therefore does not state a claim for the tort of wrongful discharge.

IV. REMAINING CLAIMS FOR RELIEF

[8] Plaintiff's seventh and eighth claims allege that defendant's failure to give plaintiff an opportunity to "retire with dignity" constitutes outrageous conduct. For the reasons stated in section II, supra, I conclude that these

claims should be dismissed.

[9] Plaintiff's ninth claim alleges that defendant's failure to allow him to retire with dignity constitutes breach of contract. For the reasons stated in section III, supra, I conclude that this claim should be dismissed.

[10] Plaintiff's tenth claim alleges that defendant's failure to allow him to retire with dignity states a claim for promissory estoppel. While it is not clear how this states any claim beyond that stated in the fifth claim I conclude, for the reasons set forth, in Section IV, supra, that this claim should not be dismissed.[6]

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6. Defendant's brief does not elaborate why the seventh through eleventh claims should be dismissed, but merely states,

[11] Plaintiff's eleventh claim alleges that defendant's acts constitute the tort of wrongful discharge. For the reasons stated in section V, supra, I conclude that this claim should be dismissed. It is

ORDERED that defendant's motion to dismiss is granted in part and denied in part. Plaintiff's second, third, fourth, sixth, seventh, eighth, ninth, and eleventh claims for damages are hereby dismissed. It is further

ORDERED that defendant shall answer plaintiff's remaining claims within ten days of the date of this order.

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6. Continued . . .
To the extent that Plaintiff's Seventh through Eleventh Claims fail to state a claim for relief based on the grounds discussed above, those claims should also be dismissed.

Appendix

554 F.Supp.327

UNITED STATES DISTRICT COURT
D. COLORADO

Civ. A. No. 81-K-1454

GARY RAWSON,

Plaintiff,

v.

SEARS, ROEBUCK AND CO.,

Defendant.

January 10, 1983

MEMORANDUM AND OPINION

KANE, District Judge.

This matter is now before me on a motion for summary judgment by defendant, Sears, Roebuck and Co. In a previous memorandum opinion and order (January 27, 1982), 530 F.Supp. 776, I dismissed several claims for relief and allowed the plaintiff to proceed on the first, fifth, and tenth claims of his complaint. These remaining claims are based on allegations of age discrimination, which is a violation of C.R.S. 1973 Section 8-2-116 (1st claim for relief), and promissory estoppel (5th and 10th claims for relief). Sears now contends that collateral estoppel precludes the plaintiff from asserting the issue of age discrimination, or in the alternative that the facts support a summary judgment in favor of the defendant. Sears also

argues that as a matter of law defendant is entitled to a summary judgment on the promissory estoppel claims because the facts show no promise to the plaintiff, and in any case no reasonable reliance by the plaintiff. In addition to briefs submitted by both parties, the record includes numerous exhibits, depositions, and affidavits. The motion is now ripe for determination.

Plaintiff Gary Rawson was an employee of Sears, Roebuck and Co. from March, 1946 to March, 1979. He was the manager of the Sears store in Pueblo from 1965 until his termination in 1979. Shortly after he was discharged, Rawson filed a claim for unemployment compensation with the Colorado Division of Employment. The Division of Employment initially ruled to disqualify Rawson from receiving benefits

for 12 weeks. He appealed and after an evidentiary hearing the decision was reversed by a Division referee who ordered a full award of benefits. Sears appealed this ruling and obtained another reversal from the Industrial Commission, who again disqualified Rawson from receiving 12 weeks of benefits. This ruling was based on a review of the record, and a finding of questionable job performance and a failure to properly administer employer procedures. Rawson petitioned the Commission for review of its order, and after it was affirmed by a final order of the Commission, he appealed to the Colorado Court of Appeals. The Court of Appeals, in affirming the Industrial Commission, determined there was sufficient evidence to support the conclusion that improper

activity by the plaintiff caused his discharge. The date has now passed for timely appeal to the Supreme Court. The instant suit was filed in a Colorado District Court and removed to this court by Sears, Roebuck.

Both plaintiff and defendant rely on Pomeroy v. Waitkus, 183 Colo. 344, 517 P.2d 396 (1973) to determine whether the doctrine of collateral estoppel is applicable under these circumstances. Defendant also relies on Kremer v. Chemical Construction Corp., ____U.S.____, 102 S.CT. 1883, 72 L.Ed.2d 262 (1982); Umberfield v. School District No. 11, 185 Colo. 165,522P.2d 730 (1974); and Colorado Springs Coach Co. v. State Civil Rights Commission, 35 Colo. App. 378, 536 P.2d 837 (1975), cert. denied 424 U.S. 948, 96S. Ct. 1420, 47 L.Ed. 2d

355 to support its argument that a final administrative order affirmed by the court of appeals must be given full faith and credit in the federal district court.

[1] Pomeroy discusses a four part test which must be met before invoking the doctrine of collateral estoppel. The four elements include:

1) Was the issue decided in the prior adjudication identical with the one presented in the action in question?

2) Was there a final judgment on the merits?

3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?

4) Did the party against whom the plea is asserted have a full and

fair opportunity to litigate the issue in the prior adjudication?

It is clear that elements two and three are satisfied in this case. However, one and four present more difficult questions. I need not evaluate the hearing procedures to determine the due process issue of the fourth element because I find that the issue decided in the prior adjudication is not identical with the one before me in the instant suit. After reviewing the various findings of fact and orders issued throughout the administrative procedures and judicial review, I can find no mention whatsoever of the issue of age discrimination. It is evident from the Industrial Commission's Findings of Fact And Order that the rulings were based solely on evidence concerning Rawson's

conduct. Possible discrimination by Sears was never mentioned. The order states in part, "In reviewing the entire record, the Commission finds that the claimant was responsible for his own separation from employment due to questionable performance of his job and failure to properly administer employer procedures." (exhibit C) The final order details the conduct of plaintiff more fully, but again never raises the issue of discrimination.[1] Judicial review concerned only whether the evidence presented was sufficient to sustain the findings. It could not consider other issues de novo. Because this cause of action does not meet the test set out in Pomeroy, the plaintiff is not collaterally estoppel from bringing the action in this court. I therefore

turn to defendant's alternative argument for summary judgment on the discrimination claim. [2,3] It is well settled that a motion for summary judgment can be granted only if there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. Pleadings, documents, and factual inferences tending to show issues of material fact must be viewed in the light most favorable to the party opposing summary judgment. The summary judgment must be denied unless

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1. Collateral estoppel, unlike res judicata, is not concerned with issues that could have been, but were not raised in the previous adjudication. However it is unlikely that the issue of age discrimination could have been fully resolved at an unemployment compensation hearing since the commission has no authority to grant the relief requested by the plaintiff.

the moving party demonstrates its entitlement beyond a reasonable doubt. Norton v. Liddel, 620 F.2d 1375 (10th Cir. 1980). Defendant has presented a persuasive argument that age discrimination did not contribute in any way to the termination of Gary Rawson. Conversely, plaintiff's arguments in support of a discrimination claim are based heavily on speculation and conjecture. Mere unsupported allegations or conclusory statements do not suffice to put a factual issue in dispute. However, since the nature of a discrimination claim involves issues of intent and state of mind, in addition to credibility of witnesses, I cannot resolve this as a matter of law. Therefore, summary judgment on the discrimination claim is denied.

Plaintiff's remaining claims are founded on the doctrine of promissory estoppel, which is based on the Restatement (Second) of Contracts Section 90:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

The Supreme Court of Colorado recently issued the following guideline in applying the doctrine of promissory estoppel:

> We believe that the doctrine as set forth in the Restatement should be applied to prevent injustice where there has not been mutual agreement by the parties on all essential terms of a contract, but a promise was made which

> the promisor should reasonably have expected would induce action or forbearance, and the promise in fact induced such action or forbearance.

Vigoda v. Denver Urban Renewal Authority, Colo., 646 P.2d 900, 905 (1982).

[4] Rawson has alleged in his complaint that the defendant "told, promised, and inferred to the plaintiff that he would have a job with Sears until his retirement." Sears contends that no such promise was ever made to Rawson, either before or after he was employed with the Company. Defendant's brief contains numerous citations to Rawson's deposition in which he enumerates the statements he relied on. None of these amounts to a promise by Sears. Further, when Rawson was first employed by Sears he signed an employment contract which included the following terms:

> [M]y employment and compensation can be terminated, with or without cause, and with or without notice, at any time, at the option of either the Company or myself. I understand that no store manager or representative of Sears, Roebuck and Co., other than the president or vice-president of the Company, has any authority to enter into any agreement for employment for any specified period of time, or to make any agreement contrary to the foregoing.

(Defendant's brief in support, P. 12 and exhibit 1, Rawson deposition.) In his deposition Rawson stated that he was unaware of any other contract between himself and Sears or any written or oral amendments relating to his employment contract since he signed the original document. (Rawson deposition, pp. 118-119).

Finally, by his own admission Rawson agrees that he cannot recall any such

promise being made to him. During the deposition, defendant's attorney asked if there had been any agent or representative of Sears who "made any statement to you, that told you, promised to you or inferred to you that you would have a job with Sears until your retirement?" Rawson responded, "Not that I can recall." (Rawson deposition, p. 87.)

Plaintiff's brief in opposition to the motion for summary judgment does not dispute the contention that a promise was never made. It does include statements and depositions of several other people on what their understanding was regarding continued employment, as long as they were performing in a satisfactory manner. This information is not relevant to the issue of whether a promise was made by Sears to Rawson that he would have a job with Sears

until his retirement.

It is clear from the uncontroverted evidence before me that Rawson cannot rely on the doctrine of promissory estoppel.

IT IS ORDERED that summary judgment is granted on claims numbered five and ten.

IT IS FURTHER ORDERED that summary judgment is denied on claim number one alleging age discrimination.

Appendix

585 F.Supp.1393

UNITED STATES DISTRICT COURT
D. COLORADO

Civ. A. No. 81-K-1454

GARY RAWSON,

Plaintiff,

v.

SEARS, ROEBUCK & COMPANY,

Defendant.

January 20, 1984

MEMORANDUM AND OPINION

KANE, District Judge.

On January 30, 1984 a jury of seven found that Sears Roebuck and Co. violated Colo. Rev. Stat. Section 8-2-116 when it terminated Gary Rawson from his job as manager of its Pueblo store in March of 1979. Defendant moved for a directed verdict at the end of the plaintiff's case and the end of its own case. I denied both motions. Since the date of jury verdict, the following briefs and motions have been filed for my consideration: Plaintiff's motion for partial summary judgment on the issue of Sears' liability under Section 8-2-116; Plaintiff's brief supporting an award of damages pursuant to the January 30, 1984 verdict in his favor; Defendant's brief opposing damages; Defendant's motions for

judgment notwithstanding the verdict or in the alternative for a new trial; Defendant's motion to strike portions of plaintiff's response to its motion for judgment notwithstanding the verdict or in the alternative for a new trial and to strike portions of the plaintiff's response brief in support of full damages.

I. MOTIONS FOR JUDGMENT N.O.V. and FOR NEW TRIAL

A. Private Right of Action Under Colo. Rev. Stat. Section 8-2-116

[1] Defendant first contends that I should overturn the verdict in this case because of the recent introduction of House Bill 1198, which according to defendant, indicates that the Colorado Legislature never intended to create a private right of action for plaintiffs

who establish a violation of Section 8-2-116. House Bill 1198 amends Colo. Rev. Stat. Section 24-34-301 et. seq. to include age discrimination among the designated unfair labor practices. Defendant argues that "the legislature would not consider enactment of House Bill 1198 without repealing the clearly inconsistent provisions of Section 8-2-116," Brief at 4, and that the only reason House Bill 1198 contains no reference to 8-2-116 is because the legislature recognizes that Section 8-2-116 is a penal statute, "the violation of which does not create a private right of action in the injured party." Id.

Defendant's argument is clever, but does not persuade me that a private right of action is not authorized by Sections 8-2-116. I have compared the provisions

of the proposed bill to the statute and find that their objectives are not totally dissimilar. See Rawson v. Sears, Roebuck & Co., 530 F. Supp. 776 (D. Colo. 1982).

B. Statute of Limitations Defense

[2] Defendant also claims that plaintiff's cause of action is time barred by Colo. Rev. Stat. Section 8-3-110(16) or in the alternative by Colo. Rev. Stat. Section 13-80-104. I need not discuss the merits of this defense because of the defendant's failure to comply with Rule 8(c) F.R.Civ.P. Since defendant failed to assert the statute of limitations defense in its answer, it is deemed waived. See Radio Corporation of America v. Radio Station KYFM, Inc., 424 F.2d 14, 17 (10th Cir. 1970).

C. Evidence Supporting the Verdict

[3] The gist of defendant's final argument for overturning the jury verdict in favor of Gary Rawson is that the evidence does not support a finding that he was terminated solely and only because of age. According to defendant, a plaintiff who seeks relief under Colo. Rev. Stat. Section 8-2-116 must separately prove each of the five elements in the statute and that mere proof of the first four elements does not create an inference that plaintiff was discharged solely and only because of age. Defendant bases this interpretation on the grounds that the statute is penal and not remedial.

> The statute at issue reads as follows: No person, firm association, or corporation conducting within this state

> any business requiring the employment of labor shall discharge any individual between the ages of eighteen and sixty years, solely and only upon the grounds of age if such individual is well versed in the line of business carried on by such person, firm, association, or corporation and is qualified physically, mentally, and by training and experience to satisfactorily perform and does satisfactorily perform the labor assigned to him or for which he applies.

Colo. Rev. Stat. Section 8-2-116 (1973). As defendant interprets the statute, Rawson had to show: 1) that he was within the protected class, ages 18-60 years, at the time of discharge; 2) was well versed in the line of business carried on by Sears; 3) was qualified physically and mentally to perform his job as manager of the Pueblo store; 4) was satisfactorily performing the job as manager at the time he was discharged; 5)

and that he was discharged solely and only because of age.

There are no cases construing the burden of proof necessary to establish a violation of Section 8-2-116 and defendant's interpretation is not persuasive. As I read the statute, once a plaintiff establishes the first four elements, he is entitled to an inference that he was the victim of discrimination on the basis of age. The evidence presented in this case required the submission of that issue to the jury. In reaching this conclusion, I am guided by the standards announced in Joyce v. Atlantic Richfield Co., 651 F.2d 676 (10th Cir. 1981):

> When faced with a motion for judgment notwithstanding the verdict, the standards by which the prerequisite motion

> for directed verdict is judged control. Judgment notwithstanding the verdict may only be granted where the evidence 'points all one way and is susceptible of no reasonable inferences that sustain the position of the party against whom the motion is made.' A mere scintilla of evidence is insufficient to justify the denial of the motion. However, since the grant of such a motion deprives the nonmoving party of a determination of the facts by a jury, judgment notwithstanding the verdict should be cautiously and sparingly granted. (citations omitted).

651 F.2d at 680. Applying those standards to this case, I find that plaintiff produced more than a "mere scintilla" of evidence tending to prove the defendant's discriminatory conduct. I must therefore deny the motions for judgment notwithstanding the verdict and for a new trial. See Blim v. Western Electric Co., Inc., 731 F.2d 1473 (10th

Cir. 1984) (denying judgment notwithstanding the verdict and motion for a new trial in ADEA case).

II. DAMAGES FOR VIOLATING COLO. REV. STAT. SECTION 8-2-116

A. The Right to Recover Damages Under Colo. Rev. Stat. Section 8-3-121

[4] Plaintiff seeks to base his recovery of damages from the defendant on Colo. Rev. Stat. Section 8-3-121. Section 8-3-121 provides that "[a]ny person who suffers injury because of an unfair labor practice has a right of action, jointly and severally, against all persons participating in said practice for damages caused to the injured person . . . ." Colo. Rev. Stat. Section 8-3-121 (1973). An unfair labor practice has been defined as the commission of "any crime in connection

with any controversy as to employment relations." Colo. Rev. Stat. Section 8-3-108(1)(1)(1973). Despite this clear language and the conclusions of law in my earlier opinion on this matter, defendant insists that plaintiff cannot recover damages under Section 8-3-121 because the statute only provides a remedy for injuries received as a result of engaging in union activity or any activities related to collective bargaining. I disagree.

Defendant ignores that portion of my earlier opinion where I succinctly stated that: "The Colorado legislature's broad definition of unfair labor practices indicates an intent to create a private right of action to anyone who can prove by a preponderance of the evidence that a defendant has violated a criminal labor

code." Rawson, 530 F. Supp. at 778. Pursuant to the jury verdict of January 30, 1984, plaintiff proved by a preponderance of the evidence that the defendant violated Section 8-2-116. He may therefore seek damages under 8-3-121.

B. Damages Recoverable Under Section 8-3-121

[5] The final issue presented is what type of damages can a victim of age discrimination recover under Section 8-3-121. The language of the statute is not helpful as it only states that any victim of an unfair labor practice "has a right of action . . . against all persons participating in said practice for **damages caused to the injured person thereby.**" (emphasis added). I must therefore decide if damages under this section include those recoverable in a

common law tort action.

The authority for awarding punitive as well as compensatory damages under Section 8-3-121 is scant. Plaintiff however, has cited the Colorado Supreme Court decision in Denver Building and Construction Trades Council v. Shore, 132 Colo. 187, 287 P.2d 267 (1955) as supporting such an award. The plaintiff in Denver Building sought damages and injunctive relief under Section 80-5-19(1) of the Labor Peace Act. Section 80-5-19 is the predecessor to Section 8-3-121. The following language in the case has been cited by plaintiff as supporting the theory that any damages recoverable under Section 8-3-121 are based in tort:

> Admitting that in the Laburnum case the tort was excessive and that in the present case it was

> mild and devoid of any rowdyism, **nevertheless, in either case a recovery in damages for injury done on account of the illegal practice is necessarily upon the basis of tort.** (emphasis added).

287 P.2d at 272. The words "on account of the illegal practice" refer to unfair labor practices as defined in the Labor Peace Act. I therefore conclude that the term damages as used in Section 8-3-121 of the Act includes those damages recoverable in a common law tort action. See also Pipeliner's Local Union No. 798 v. Ellerd, 503 F.2d 1193, 1201 (10th Cir. 1974) ("recovery of damages for injury incurred as a result of illegal practices is founded in tort . . ." citing Denver Building and Construction Trades Council v. Shore).

Defendant opposes this interpretation and argues that such an

award cannot be made under Section 8-3-121 because the statute does not specifically provide for the recovery of such damages. Defendant supports its argument by referring to the Age Discrimination in Employment Act, 29 U.S.C. Section 626(b), (c), and the recent Tenth Circuit decision in Perrell v. FinanceAmerica Corp., 726 F.2d 654 (10th Cir. 1984). In Perrell, the Tenth Circuit held that the trial court committed "fundamental error" when it tendered jury instructions on the availability of compensatory damages under the ADEA. The court reasoned that such damages are not "provided within the enforcement scheme of the ADEA." 726 F.2d at 657. The court did not specifically state whether punitive damages are available under the ADEA. I assume,

however, from reading the cases supporting the decision that they are not recoverable in this circuit.[1] Nevertheless, the Tenth Circuit's interpretation of the ADEA does not prevent this plaintiff from seeking punitive and compensatory damages under Section 8-3-121. First, the language of the ADEA is totally dissimilar to the language in the state statute[2] and second, the Colorado Supreme Court in

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1. Judge Moore reached the same conclusion in Smith v. Montgomery Ward & Co., Inc. 567 F.Supp. 1331, 1334 (D. Colo. 1983). But see contra Wise v. Olan Mills, Inc. of Texas, 485 F.Supp. 542 (D. Colo. 1980) (Carrigan, J.); Kennedy v. Mountain States Tel. & Tel., Co., 449 F.Supp. 1008 (D. Colo. 1978) (Kane, J.).

2. Section 626(b) of the ADEA allows a person to seek any "legal or equitable relief." Section 8-3-121 gives a right of action for "damages caused to the injured person thereby."

Denver Building recognized that any damage remedy under Section 8-3-121 is based in tort.

III. MOTION TO STRIKE

Defendant has asked me to strike portions of plaintiff's briefs filed in support of full damages and opposing defendant's motions for judgment notwithstanding the verdict and for a new trial, on the grounds that they violate Rule 12(f), F.R.Civ.P. Rule 12 (f) allows me to order stricken from any pleading any insufficient defense or redundant, immaterial, impertinent, or scandalous matter. "Immaterial matter is that which has no essential or important relationship to the claim for relief or the defenses being pleaded, . . . " Wright & Miller, Federal Practice and

Procedure: Civil Section 1382 at 822 (1969). "Impertinent matter consists of statements that do not pertain, and are not necessary, to the issues in question." Id. at 825. See also Equal Employment Opportunity Commission v. Ford Motor Company, 529 F.Supp. 643, 644 (D. Colo. 1982) ("so unrelated to plaintiff's claims as to be unworthy of any defense.").

[6,7] I agree with defendant that certain portions of plaintiff's briefs are immaterial and impertinent within the meaning of Rule 12(f). Yet, defendant must demonstrate that it will be unduly prejudiced if these allegations are not stricken. Defendant has not met that burden. It is fundamental that a motion to strike will be denied if no prejudice

can result from the challenged allegation, "even though the matter literallly is within the categories set forth in [r]ule 12f." Wright & Miller, Federal Practice and Procedure: Civil Section 1382 at 810-811 (1969). The fact is that such immaterial and impertinent matters do not impress me. The effect, miniscule as it is, is counterproductive to the plaintiff's object.

IT THEREFORE ORDERED THAT:

The defendant's motion to strike is denied. Defendant's motions for judgment notwithstanding the verdict and for a new trial are also denied. Plaintiff's motion for partial summary judgment on the issue of defendant's liability for violating Colo. Rev. Stat. Section 8-2-116 is granted. Plaintiff may seek

compensatory and punitive damages[3] for Sears' violation of Section 8-2-116.

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3. In order to recover punitive damages, plaintiff will have to prove beyond a reasonable doubt that Sears discharged him with "malice." See Colo. Rev. Stat. Section 13-21-102 (1973); Frick v. Abell, 198 Colo. 508, 602 P.2d 852 (1979).

Appendix

615 F.Supp.1546

UNITED STATES DISTRICT COURT
D. COLORADO

CIV. A. No. 81-K-1454

GARY RAWSON,

Plaintiff,

vs.

SEARS, ROEBUCK AND COMPANY,

Defendant.

August 28, 1985

MEMORANDUM AND OPINION

KANE, District Judge.

Plaintiff's Complaint was filed in July, 1981, in the District Court in and for the County of Pueblo. It was removed to the United States District Court for the District of Colorado. On January 27, 1982, all but three of the plaintiff's claims for relief were dismissed. Rawson v. Sears, Roebuck and Co., 530 F.Supp. 776 (D. Colo. 1982). In that same opinion, I held a that private right of action could be implied under C.R.S. Section 8-2-116.

On January 10, 1983, I granted summary judgement in favor of Sears on two of the plaintiff's remaining three claims. Rawson v. Sears, Roebuck and Co., 554 F.Supp 327 (D. Colo. 1983). I denied Sears' motion for summary judgment

on plaintiff's claim of violation of C.R.S. Section 8-2-116, holding that the findings and order of the Colorado Industrial Commission, affirmed by the Colorado Court of Appeals, did not collaterally estop plaintiff from litigating the issue of the reason for plaintiff's discharge. I also denied Sears' Motion for Reconsideration and Sears' Motion for Summary Judgment or, in the Alternative, for Certification of Questions of Law.

On January 20, 1984, I issued an order granting and denying pre-trial motions. I granted Sears' request for a separate trial on the issue of liability, pursuant to Rule 42, Fed.R.Civ.P. I further ordered that because Mr. Jansen had testified at his deposition that the

reason for plaintiff's discharge was the mishandling of inventory, Sears would not be allowed to introduce any statements or testimony relating to incidents or conduct of the plaintiff other that those related to the inventory charges.

On January 30, 1984 a jury of seven found that Sears, Roebuck and Co. violated Colo. Rev. Stat. Section 8-2-116 when it terminated Gary Rawson from his job as manager of its Pueblo store in March of 1979. Defendant moved for a directed verdict at the end of plaintiff's case and at the end of its own case. I denied both motions.

On July 15, 1985 a new jury of six was selected to try the issue of damages. Trial proceeded to conclusion. Instructions of law were given to the

jury without objection. On July 19, 1985 the jury returned its verdict awarding the plaintiff damages against the defendant in the following amounts:

> A. $580,500.00 for lost wages and benefits from the date the plaintiff would have retired.
>
> B. $264,410.00 for future wages and benefits and reduction in the value of pension benefits from the date of verdict discounted to present value.
>
> C. $5,000,000.00 for pain, suffering and humiliation, both past and future.

The jury also found, according to Colorado law, beyond a reasonable doubt that the injuries and losses complained of by the plaintiff were attended by circumstances of malice or a wanton or reckless disregard of the rights and feelings of the plaintiff and awarded $10,000,000.00 as exemplary damages.

Defendant has moved for judgment notwithstanding the veredict or, in the alternative for a new trial or remittitur. Defendant makes the following four arguments:

1. **This court should enter judgment in favor of Sears notwithstanding the verdict with respect to the jury's award of punitive damages.**

Defendant submits that the jury verdict of $10,000,000.00 for punitive damages is unsupported by the evidence and thus seeks judgment N.O.V. Sears claims that the evidence presented at trial demonstrates that its conduct did not meet the standard required to justify punitive damages ("beyond a reasonable doubt"). It also claims that plaintiff failed to show an evil intent or reckless disregard of his rights and feelings,

which is necessary for the award of punitive damages. Rather, defendant points to plaintiff's own misconduct during his employment with Sears, conceded by plaintiff at trial, as supportive of its articulated reasons for discharging plaintiff.

2. **The compensatory damages for pain and suffering awarded by the jury are excessive and contrary to the evidence.**

Defendant states that $5,000,000.00 awarded by the jury for pain, suffering and humiliation is grossly excessive and unreasonable. Defendant calls on me to exercise sound discretion to prevent a miscarriage of justice. Defendant states that the "law in this District is clear that a 'federal trial judge has not only the discretion to grant a new trial in

order to prevent a miscarriage of justice, but it is his **obligation** to do so where it appears to him that the verdict has been arbitrary and against the clear weight of the evidence.'" Atchison, Topeka and Santa Fe Railway Company v. Hadley Auto Transport, 216 F.Supp. 94, 97 (D. Colo. 1963) (see pp. 6-7 of Defendants' Brief). Defendant also notes that exercise of such a power by the court "is not in derogation of the right of trial by jury but is one of the historic safeguards of that right." Holmes v. Wack, 464 F.2d 86, 88 (10th Cir. 1972).

Defendant further observes that the Tenth Circuit in Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 703 F.2d 1152, 1168 (10th Cir. 1981) has set

down guidelines for whether an award by a jury of **either** compensatory or punitive damages can be set aside.

> We have said that absent an award so excessive as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial, the jury's determination of the damages is considered inviolate. Metcalf v. Atchison, Topeka and Santa Fe Railway Co., 491 F.2d 892, 898 (10th Cir.) . . . Such bias, prejudice or passion can be inferred from excessiveness. Wells v. Colorado College, [478 F.2d 158, 162 (10th Cir.)] . . . However, a verdict will not be set aside on this basis unless it is so plainly excessive as to suggest that it was the product of such passion or prejudice on the part of the jury. [Id.] . . .
>
> Such cases recognize the principle that if the court determines that the verdict was the result of passion or prejudice, or for any other reason it appears that the jury erred or abused its discretion

> not only on the issue of damages but also on the issue of liability, the court must unconditionally order a new trial and cannot give the plaintiff the option to accept a lesser amount . . . .
>
> However, another remedy is also recognized. Where the court concludes there was error only in an excessive damage award, but not one also tainting the finding of liability, the appellate court may order a remittitur and alternatively direct a new trial if the plaintiff refuses to accept the remittitur, a widely recognized remedy. Holmes v. Wack, 464 F.2d 86, 89 and n. 3 (10th Cir.) . . .

While defendant agrees it is an emotional event for plaintiff to lose a job he has held all his working life, it opines that the "award for pain and suffering returned by the jury, however, suggests that Rawson's depression and despondency has a compensatory value of several times that of a traumatic

physical injury such as would render an individual a quadraplegic" (see p. 9 of Defendant's Brief.) (Defendant cites two recent Colorado district court cases awarding quadraplegic plaintiffs $4,900,000 and $4,100,000 for pain and suffering, loss of income, and medical expenses.) (See p. 9 of Defendants Brief.) Defendant also notes that plaintiff's counsel suggested a figure of $1,000,000.00 as appropriate damages for pain and suffering. Thus, defendant claims, the jury's verdict was excessive and not reasonably based upon the evidence at trial.

3. **The damages awarded by the jury for economic loss are also excessive and unreasonable and a new trial should be granted.**

Without citing any case law and relying entirely upon the expert testimony of Dr. Wykstra regarding plaintiff's loss of wages, defendant claims that the jury's award of damages for lost wages and benefits as well as future wages and benefits was in excess of any evidence in the record. Based on such testimony, the defendant asserts that the jury award of $580,500.00 for lost wages and benefits should be reduced to $314,000.00. It also asserts that the jury award for economic loss exceeded any evidence on the subject by $101,510.00. Thus, defendant requests a new trial on all issues relating to wage loss, past and future.

4. The punitive damages awarded by the jury are grossly excessive and

unreasonable, and a new trial should be granted.

Defendant states a new trial must be granted because of the extraordinarily excessive amount of punitive damages awarded by the jury. While defendant concedes a jury has discretion in making punitive damages awards, it notes that such damages are subject to the supervision of the court which may order remittitur or a new trial to prevent a miscarriage of justice. Defendant further notes that in Colorado the amount of punitive damages awarded must bear some relation to the gravity of the injuries sustained by plaintiff and to the amount of compensatory damages, Frick v. Abell, 198 Colo. 508, 602 P.2d 852, 854 (1979); and the degree of the defendant's malice must also be

considered in determining the proper relationship between punitive and compensatory damages, Taylor v. Sandoval, 442 F.Supp. 491, 496 (D. Colo. 1977).

Defendant calls my attention to several facts to be considered in determining the amount of punitive damages which reasonably could be awarded to plaintiff. Defendant first argues that evidence demonstrating its evil intent or reckless disregard for the feelings of plaintiff is minimal to nonexistent. Second, assuming that I will reduce to some substantial degree the compensatory damage award for pain and suffering, defendant notes that the punitive damage award should be reduced proportionately. Finally, defendant notes that plaintiff only sought punitive damages in the amount equivalent to the

compensatory damages requested in his complaint; even if the compensatory damage award is not reduced, this ratio suggests that punitive damages should not exceed the amount of compensatory damages awarded.

In conclusion, defendant asserts that such an excessive award of punitive damages demonstrates that the jury acted out of prejudice, passion and sympathy for the plaintiff. Defendant thus requests a new trial absent the acceptance of a substantial remittitur of the punitive damages.

In the majority of cases, the discussion of remittitur relates only to punitive damages. Several cases, however, address the issue of remittitur of actual damages. In K-B Trucking Co. v. Riss International Corporation, 763

F.2d 1148 (10th Cir. 1985), the jury had awarded plaintiffs actual and punitive damages on their fraudulent misrepresentation claims against two defendants. The Court of Appeals found sufficient evidence to support the jury's findings of liability against both defendants, as well as sufficient evidence to support the actual damage award against one of the defendants; there was insufficient evidence to support an actual damage award against the second defendant, however. The court, therefore, stated that remittitur would be appropriate under the circumstances. The court was guided by the "abuse of discretion" standard enuciated in Garrick v. City and County of Denver, 652, F.2d 969, 971 (10th Cir. 1981) which stated:

> Under federal law, whether the trial court properly refused to grant remittitur or a new trial on the ground of an excessive damage award is tested by an abuse of discretion.

In Garrick the court found that the trial court had abused its discretion in light of the insufficiency of the evidence to support the actual damage award against the second defendant. The trial court thus should have ordered remittitur and alternatively, directed a new trial if the defendant refused to accept the remittitur.

Blevins v. Cessna Aircraft Co., 728 F.2d 1576 (10th Cir. 1984) involved a product liability action against an airplane manufacturer in which the plaintiff sought damages for injuries during an emergency off-field landing after the plane developed engine trouble.

After consideration of plaintiff's injuries as detailed in the record and the evidence concerning the extreme pain he endured, the court could not say that the jury's award of $1.3 million (of the $2 million verdict) for pain, suffering, and disability "shocks the judicial conscience." The court also refused to find reversible error based on defendant's argument that plaintiff's counsel made improper "Golden Rule" remarks (remarks encouraging the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence.) The court conceded that plaintiff's counsel made a few improper remarks, appealing for sympathy and some prejudice, but in considering the remarks and arguments as a whole, and noting the

lack of any timely objection, the court found no reversible error. The court concluded that "the $2 million jury award, while very substantial, was not so excessive as to require reversal or remittitur in light of the record as to all the items of damages." Id. at 1582.

In Hurd v. American Hoist and Derrick Co., 734 F.2d 495 (10th Cir. 1984), a successful products liability action was brought against a manufacturer of an oil field safety block, and the district court denied a subsequent motion for a new trial and for remittitur. The defendant appealed, challenging the award of over $60,000 for "severe and permanent injuries, great pain of body and mind and permanent disability." Id. at 502. In rejecting defendant's claim, the court held:

> In light of the evidence of serious injury and pain and suffering, we are not persuaded that the damage award was excessive or unsupported by the evidence. '[A]bsent an award so excessive or inadequate as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial, the jury's determination of the fact is considered inviolate.' Id. at 503, quoting Garrick v. City and County of Denver, 652 F.2d 969, 971-72 (10th Cir. 1981) which quotes Barnes v. Smith, 305 F.2d 226, 228 (10th Cir. 1962).
>
> Under our standard, we conclude that here the award was not so plainly excessive that we should infer that it was the result of passion or prejudice, and we cannot hold the award is shocking to the conscience of the court; therefore we should not order a remittitur. Id.

Colorado courts and the Tenth Circuit in Malandris and in other decisions, have consistently held that

while bias, prejudice or passion can be inferred from an excessive damage award, a verdict will not be set aside unless it is plainly excessive so as to suggest that it was the product of such passion or prejudice on the part of the jury. Blevins v. Cessna Aircraft Co., 728 F.2d 1576 (10th Cir. 1984); Garrick v. City and County of Denver, 652 F.2d 969, 971-72 (10th Cir. 1981); Hurd v. American Hoist and Derrick Co., 734 F.2d 495 (10th Cir. 1984); Leo Payne Pontiac, Inc. v. Ratliff, 20 Colo. App. 386, 486 P.2d 477 (1971), rev'd on other grounds, 178 Colo. 361, 497 P.2d 997 (1972).

In Burns v. McGraw-Hill Broadcasting Company, Inc., 659 P.2d 1351 (Colo. 1983), the Supreme Court of Colorado held that in a defamation case, it would not set aside the jury's determination of

damages unless they are "so outrageous as to strike everyone with the enormity and injustice of them, and so as to induce the court to believe that the jury must have acted with prejudice, partiality or corruption." Id., at 1356 (quoting Riss & Co. v. Anderson, 108 Colo. 78, 85, 114 P.2d 278, 281 (1941)). The Riss opinion, authored by Mr. Justice Young, in turn quotes heavily from Colorado Springs & Interurban R.R. Co. v. Kelly, 65 Colo. 246, 176 Pac. 307:

> As relates to the contention of excessive damage, we must bear in mind and be governed by the rule laid down by Chancellor Kent more than a century since, and generally adhered to by all courts, and by this court; that it is exclusively the province of the jury to estimate and assess the damages, and that the amount to be allowed in such cases rests largely in their sound discretion. He said:

> The question of damages was within the proper and peculiar provices of the jury. It rested in their sound discretion, under all the circumstances of the case, and unless the damages are so outrageous as to strike everyone with the enormity and injustice of them, and so as to induce the court to believe that the jury must have acted from prejudice, partiality or corruption, we cannot, consistently with the precedents, interfere with the verdict. It is not enough to say, that in the opinion of the court, the damages are too high, and that we would have given much less. It is the judgment of the jury and not the judgment of the court, which is to assess the damages in actions for personal torts and injuries.

And as was well said by Justice Story in Thurston v. Martin, 5 Mason 497, Fed Cas. No. 14018:

> It is one thing for a court to administer its own measure of damages in a case properly before it, and quite another thing to set

> aside the verdict of a jury because it exceeds that measure.

Palmer v. A.H. Robins Co., Inc., 684 P.2d 187 (Colo. 1984) involved a products liability action to recover compensatory and punitive damages from a manufacturer of an intrauterine device. In its discussion of punitive damages, the court noted that such damages do not admit of precise determination; thus, the amount of the award must necessarily rest, in the first instance, within the discretion of the fact finder. Id. at 220. While there is no precise formula to determine the relationship between punitive and actual damages, there is a need for judicial scrutiny to ensure that the jury is not impermissibly motivated by prejudice or not properly guided by the

purposes for punitive damages. The court noted that

> [a]lthough a ten-to-one ratio of punitive to compensatory damages warrants close judicial scrutiny, we note that high ratios have been upheld where the record shows that the jury was properly guided by the purposes of a punitive damages award in reaching its verdict. See, e.g., Mailloux v. Bradley, 643 P.2d 797 (Colo. App. 1982) (rations of 10:1 and 35:1 upheld); see also, e.g. Vossler v. Richards Mfg. Co., Inc., 143 Cal. App. 3d 952, 192 Cal. Rptr. 219 (1983) (20:1 ratio upheld); Ettus v. Orkin Exterminating Co., Inc., 233 Kan. 555, 665 P.2d 730 (1983) (24:1 ratio upheld) . . . Id. at 220.

In Palmer, supra, the court saw no reason to view the jury's verdict

> as other than the conscientious decision of a jury to punish a wrongdoer with a penalty commensurate with the seriousness of the misconduct and the financial ability of the offender to pay and, concomitantly, to deter [the

> defendant] and others from similar acts of misconduct in the future. Id. at 221.

Several Coloardo appellate court cases address this same issue. In Martin v. Bralliar, 36 Colo. App. 254, 540 P.2d 1118, 1122 (1975), a medical malpractice action, the court stated that the "assessment of damages is the exclusive province of the jury, and it is only in the clearest cases that its award will be overturned on review." In Good v. A.B. Chance Co., 39 Colo. App. 70, 565 P.2d 217 (1977), a wrongful death action against the manufacturer and retailer of an aerial boom device, the jury award exceeded by $44,000 the amount of pecuniary loss projected by the plaintiff's economist. The court did not find the jury's award to be grossly excessive since the expert had conceded

his figures were conservative and the jury was not required to adhere strictly to the expert testimony. Id. at 226.

An A.L.R. annotation addresses the recovery of damages for emotional distress in cases of discrimination based on sex and marital status. Annot., 61 A.L.R. 3d 944 (1975). The annotation notes:

> By way of background, it should be noted that the courts in most jurisdictions where the question has arisen have in the appropriate circumstances permitted recovery of damages for emotional distress resulting from a variety of forms of discrimination. Id. at 945.

Normally, under common law principles, courts have required a showing of outrageous conduct in order to obtain such recovery. Courts have relaxed this standard, however, where a

special relationship was shown between the parties--i.e., employer-employee, "apparently upon the theory that it would be tantamount to extortion to permit a defendant who wields actual or apparent power over the plaintiff to abuse his position." Id. at 945.

It is to be remembered that this is a case involving the law of Colorado. It is not related in any way to the federal Age Discriminiation in Employment Act nor to the congressional history of that Act nor to policies and decisions of federal courts interpreting that Act. Here, the plaintiff filed his case in a state court pursuant to a state statute. The case was removed to the federal court by the defendant. Nevertheless, Colorado law governs.

Indeed, the plaintiff's choices of law and forum set upon him a much higher burden. Under the Colorado statute age discrimination must be shown to be the sole and only reason for termination. Having met that burden, a plaintiff is entitled under Colorado law to recover unliquidated as well as liquidated damages. If plaintiff proves his claim for relief, he may also recover exemplary damages if he can prove beyond a reasonable doubt that the wrong done to him was attended by circumstances of fraud, malice or insult, or a wanton and reckless disregard of his rights and feelings.

I have written three opinions in this case, listened to the evidence in two separate trials before two distinct juries. I find no evidence to suggest

that the verdict returned in either trial was the product of passion, prejudice or misconduct. Nor do I find that the verdict on the damages trial was contrary to the evidence. It is obvious that the jury considered the evidence and, in its wisdom, rejected the defendant's evidence. Issues of credibility are supposed to be resolved by a jury as the finders of fact. Indeed, it is probable that this jury rejected defendant's evidence because the members of the jury found it was pretextual.

Certainly, evidence was presented which, if believed, would have supported a defense verdict. In equal measure, evidence was presented, and apparently believed, that justified verdicts on actual as well as exemplary damages.

At the time of his firing the plaintiff was almost sixty years old. From completion of his military service in World War II until his termination he devoted his entire working life to the defendant's business. For thirty-three years his performance was never below satisfactory, was frequently superior and, in some instances, was recognized as excellent. His performance was repeatedly and systematically evaluated. There was ample evidence from which the jury could conclude that the plaintiff was a loyal, dedicated and productive employee.

There was substantial evidence from which the jury could find that the plaintiff was discharged in a callous and demeaning manner; that the method of investigation and termination was

insulting and utterly disregarded plaintiff's rights and feelings; and that the plaintiff was discharged in pursuit of a company-wide plan to reduce the number of older employees in order to make room for promotions of younger employees. The evidence clearly showed that the defendant reaped large financial gains from employee cutbacks.

The question of whether the damages awarded are so excessive as to require a vacation of the verdict or remittitur remains to be addressed. Plaintiff's actual damages are clearly supported by evidence in the record. Both economists testified that they were using conservative estimates. The jury was not bound to those estimates. It was within the jury's province to determine the plaintiff's probable retirement date, his

predictable pay increases based on earnings history and the appropriate amount to discount to present value. Plaintiff's Exhibit 498 more than amply provides the basis for the jury's determinations.

It is not for me to say that a jury's assessment of unliquidated damages is wrong because I would have arrived at a different figure. Indeed, the constant exposure to death, injury and outrage which confronts judges necessarily jades our vision and immures our emotions. The genius of the jury system is the deliverance of judgment by collective response from members of the community who have ordinary experience.

In its argument the defendant compares the damages awarded by the jury for pain, suffering and humiliation to

sums awarded in physical injury cases involving quadraplegia. The comparison is inapposite for a whole host of reasons, not the least of which is the presence in such cases of other sources of compensation and treatment.

The injuries suffered by the plaintiff in this case are more akin to those suffered in defamation cases. Indeed, the plaintiff's reputation in his community was destroyed by the acts of defendant. The plaintiff was totally disgraced to the extent that he contemplated suicide. Large awards in similar circumstances have been awarded.

This case was tried to a jury of six persons. One was a retired college professor, another was a registered professional pharmacist; others were college educated. The members of this

jury sat together, consulted with one another and applied their separate experiences in the affairs of life to the facts adduced at trial. There is not even the breath of a suggestion that this jury based its verdict on anything other than the evidence offered at trial. From this trial these six jurors drew a unanimous conclusion which it is the very function of the law to obtain. As Justice Hunt said so well in Sioux City & P. Ry. Co. v. Stout., 84 U.S. 657, 664, 17 Wall. 657, 21 L.Ed. 745 (1874), "It is assumed that twelve men know more of the common affairs of life than does one man: that they can draw wiser and safer conclusions from admitted facts thus occuring than can a single judge."

In sum, I think it would be the worst sort of judicial activism to vacate

this verdict merely because I might have reached a different result or because the lawyers made different evaluations. The punitive damage award is less than twice the actual damage award; well within the range of reasonableness surveyed by the Tenth Circuit in Malandris v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 703 F.2d 1152 (1981).

I am simply not imperious enough to say that this jury did not know what it was doing or that passion, prejudice or corruption or other improper cause invaded the trial. On the basis of conflicting and sometimes unexplained evidence, this jury found in favor of an individual and against a vast corporate enterprise. Its award of exemplary damages bears a reasonable relationship to the actual damages which it found and

yet is large enough to fulfill the purpose of exemplary damages as stated in the instructions of law delivered to it. Based on the evidence I heard, my judicial conscience is not shocked--though my acquired cynicism has received a rather sharp blow.

For these reasons, defendant's post-trial motions are denied. An amended judgment shall enter this day in the total sum of $19,096,495.01. A stay of execution on the judgment is granted until September 13, 1985. Bond on appeal is set at $24,000,000.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 81-K-1454

GARY RAWSON, Plaintiff,

v.

SEARS, ROEBUCK AND CO., Defendant.

JUDGMENT

Pursuant to and in accordance with the Order entered by the United States Court of Appeals for the Tenth Circuit on June 10, 1987, it is hereby

ORDERED that judgment is entered for the defendant Sears, Roebuck and Co. and against the plaintiff Gary Rawson; that the party is to pay his or its own costs.

Dated at Denver, Colorado, this 13th day of October, 1987.

BY THE COURT:
John L. Kane, Jr.
U.S. District Judge

CONSTITUTION OF THE UNITED STATES

Article V

Grand jury - indictment - jeopardy - process of law - taking property for public use.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

CONSTITUTION OF THE UNITED STATES

Article X

Reserved Powers. The powers not delegated to the United States by the consitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Article XIV

Section 1. Citizenship defined - privileges of citizens.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor

deny to any person within its jurisdiction the equal protection of the laws.

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28 U.S.C. section 1254

Cases in the courts of appeals may be reviewed by the following methods:

(1) By writ of certiorari granted upon a petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

COLORADO APPELLATE RULES

Rule 21.1. Certification of Questions of Law

(a) Power to Answer. The Supreme Court may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, a United States District Court, or United States Court of Claims, when requested by the certifying court, if there is involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court. (Amended and effective Jun 24, 1976.)

(b) Method of Invoking. This Rule

may be invoked by an order of any of the courts referred to in section (a) upon said court's own motion or upon the motion of any party to the cause.

(c) Contents of Certification Order. A certification order shall set forth:

(1) The question of law to be answered; and

(2) A statement of all facts relevant to the questions certified and showing fully the nature of controversy in which the questions arose.

(d) Preparation of Certification Order. The certification order shall be prepared by the certify court, signed by the judge presiding at the hearing, and forwarded to the Supreme Court by the clerk of the certifying court under its official seal. The Supreme Court may require the original or copies of all or

of any portion of the record before the certifying court to be filed under the certification order, if, in the opinion of the Supreme Court, the record or portion thereof may be necessary in answering the questions.

(e) Costs of Certification. Fees and costs shall be equally dividied between the parties unless otherwise ordered by the certifying court in its order of certification.

(f) Briefs and Agrument. Upon the agreement of the Supreme Court to answer the questions certified to it, notice shall be given to all parties. The plaintiff in the trial court, or the appealing party in the appellate court shall file his opening brief within thirty days from the date of receipt of the notice, and the opposing parties

shall file an answer brief within thirty days from service upon him of copies of the opening brief. A reply brief may be filed within twenty days of the service of the answer brief. Briefs shall be in the manner and for of briefs as provided in C.A.R. 28. Oral arguments shall be as provided in C.A.R. 34.

(g) Opinion. The written opinion of the Supreme Court stating the law governing the questions certified shall be sent by the clerk under the seal of the Supreme Court to the certifying court and to the parties.